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SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1481

UNION CAMP CORPORATION,
Petitioner,

versus

GYPSUM CARRIER, INC. AND OCEANIC CARRIER, INC., AS BAREBOAT CHARTERER AND OWNER RESPECTIVELY OF THE MOTORSHIP "PACIFIC CARRIER", PETITIONING FOR EXONERATION FROM OR LIMITATION OF LIABILITY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Oceanic Carrier, Inc.

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Respondents Gypsum Carrier, Inc. and Oceanic Carrier, Inc. respectfully submit the following brief in opposition to the petition for writ of certiorari.

I.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review as stated on page 3 of the petition for writ of certiorari include some

extraneous matter about the interaction of wind forces upon petitioner's stack emissions said by respondents to have been the proximate cause of this maritime collision. The intervention of wind forces is a subject not touched upon in the record which forms the basis of this appeal. The question presented for review is more accurately stated as follows:

Whether a tort which originates on land out of a non-maritime activity but which takes effect on navigable waters, producing an obstruction and a hazard to navigation, injury to a vessel in active maritime service, a maritime collision between the vessel and a bridge spanning navigable waters, temporary blockage of a navigable waterway, and subjecting the vessel to maritime claims of third parties, has a "substantial connection with maritime activities or interests"[1] and a relationship to "traditional maritime activity"[2] so as to be within the admiralty jurisdiction.

II.

STATEMENT OF THE CASE

The "statement of the case" contained in the petition for certiorari is generally accurate except for the fourth paragraph at page four which begins: "The Shipowners allege..." This paragraph contains a mis-

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[1]The test of admiralty tort jurisdiction announced in *Peytavin v. Government Employees Insurance Company*, 453 F. 2d 1121, 1127 (5th Cir. 1972).

[2]*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 261 (1972).

leading characterization of the Shipowners' claim over against Union Camp, particularly the reference to "the fortuitous circumstances of wind direction" upon the plant emissions which is no part of the record on appeal, and the failure to point out that the claim is based upon nuisance as well as negligence grounds and the failure to include the contention that the stack emissions violated applicable federal and state regulations. The Shipowners' claim over against Union Camp may be more accurately summarized as follows:

The Shipowners' third-party complaint and cross-claim against Union Camp allege that the stack emissions of Union Camp's waterfront mill unreasonably interfered with their reasonable use of a navigable waterway, that the mill emissions constituted a nuisance, that Union Camp negligently failed to control the emissions from the mill, that the smoke emissions from the mill were in violation of state air quality control regulations, and that the smoke obscured navigation lights and signals on the bridge in violation of federal regulations respecting aids to navigation.

III.

REASONS FOR DENYING THE WRIT

Of the four reasons set forth by the petitioner as justifying grant of a writ of certiorari in this case, two are irrelevant. Section VI (A) at pages 5-7 argues that the decision of the Court of Appeals which is the target of this petition for certiorari is in conflict with an earlier decision of the *same Court of Appeals*. A

conflict of decisions within a federal judicial circuit is not a reason recognized by Rule 19 of this Court for granting certiorari.

Section VI (C) at pages 10-11 of the petition argues that the stack emissions of Union Camp could not constitute an obstruction to navigation because the emissions were not intended to be obstructive. Aside from the fact that this argument is wholly fallacious[3], it also represents an issue of fact irrelevant to this review which is concerned with the District Court granting a motion to dismiss for lack of admiralty jurisdiction.

The only relevant consideration suggested by Rule 19 of this Court which is raised in the petition for writ of certiorari is that the Court of Appeals decision in the case *sub judice* is in conflict with an applicable decision of this Court, namely *Executive Jet Aviation, Inc. v. City of Cleveland.*[4] Essentially the Court of Appeals has interpreted *Executive Jet* as acknowledging that claims for damage to or interference with vessels engaged in maritime commerce upon navigable waters are historically and properly cognizable in admiralty. There is nothing in the *Executive Jet* decision

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[3]A nuisance is no less a nuisance because the injury may not have been intended. See 66 C.J.S. Nuisances §10. "Nor is it a defense that it was the intervening agency of the west wind which carried the steam across the roadway, since the Company was bound to anticipate the action of the prevailing air currents . . ." *Lavelle v. Grace*, 34 A. 2d 498, 501, 150 ALR 366, 369 (Pa. Sup. Ct. 1943).

[4]409 U.S. 249 (1972).

which is in conflict with this principle. The rationale of *Executive Jet* is that a land based airplane travelling between two inland locations is neither a "vessel" nor a maritime object and, therefore, is not entitled to an admiralty remedy for damage to the aircraft. The plain implication of *Executive Jet* is that the result would have been entirely different had the claim been for damage to a vessel engaged in maritime commerce. This distinction is thoroughly explored in the opinion of the Court of Appeals.

The fourth and final reason advanced in the petition for Union Camp for granting writ of certiorari is that it is necessary to settle an important question of admiralty jurisdiction. Claims for damage to vessels and interference with navigation have been the common business of admiralty courts for centuries[5] and, except for the opinion of the District Court in this case, the jurisdiction of admiralty over such claims has never been called into question as far as our research discloses.

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[5]This principle of admiralty jurisdiction extends back at least as far as 1632 when the twelve judges of England subscribed to the following resolution:

> "Likewise, the admiral may inquire of, and redress all annoyances and obstructions, in all navigable rivers beneath the first bridges, that are impediments to navigation, or passage to or from the sea, and, also, to try personal contracts and injuries there, which concern navigation on the sea."

DeLovio v. Boit, 7 F. Cas. 418, 431 n. 28 (No. 3,776); Mears, *The History of The Admiralty Jurisdiction*, 2 Select Essays in Anglo-American Legal History 312, 358 (1908).

IV.

CONCLUSION

The petition for certiorari fails to raise any issue recognized by Rule 19 of this Court which would justify the granting of a writ of certiorari upon any of the questions presented in the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George H. Chamlee, of counsel for respondents Gypsum Carrier, Inc. and Oceanic Carrier, Inc., hereby certify that in accordance with the Rules of the Supreme Court of the United States I have served a copy of the foregoing motion upon the Petitioner by depositing same in the United States Mail, postage prepaid, addressed to Petitioner's counsel of record at the addresses shown below:

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This ____ day of May, 1974.

George H. Chamlee
Of Counsel for Respondents,
Gypsum Carrier, Inc. and
Oceanic Carrier, Inc.